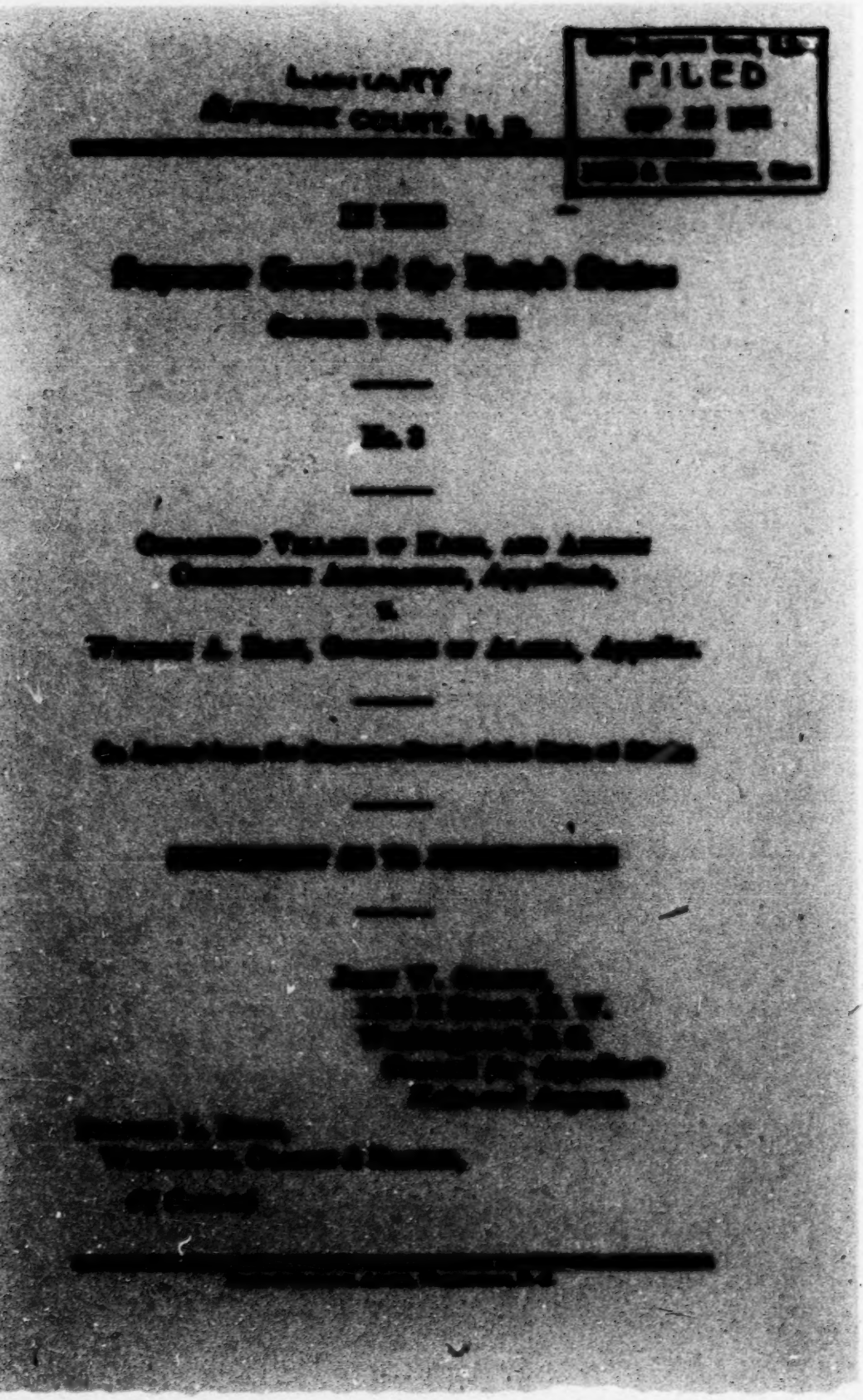
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 3

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ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, *Appellee.*

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**On Appeal from the Supreme Court of the State of Alaska**

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## STATEMENT AS TO JURISDICTION

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Appellants appeal from a decision of the Supreme Court of the State of Alaska handed down June 2, 1961, affirming the judgment of the District Court for the District of Alaska in Juneau, acting as an interim or

transitional state court, dismissing a claim for injunctive relief. This jurisdictional statement is submitted to show: (1) the Supreme Court has appellate jurisdiction, and (2) a substantial question is herewith presented under the rules of this Court.

## THE OPINION BELOW

The opinion of the court below, rendered June 2, 1961, is reported in 362 P. 2d 901. A copy of said opinion is included in the separate Appendix filed on behalf of these appellants and also the Metlakatla Indian Community with whom the case was argued and decided below.

The case is already on the docket of this Court pursuant to a previous appeal from the transitional court. It is now Docket No. 3 (associated with No. 2, *Metlakatla Indian Community* v. *Egan*). The decision of this Court directing appellant to proceed with their appeal to the Supreme Court of Alaska, for clarification of certain issues, is reported in 363 U.S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice, upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record in Docket 2-3 and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pages 67-69 of the record of the previous appeal, No. 2-3.[1]

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[1] The record in Dkts. 326-327, O.T., 1959 (now Dkts. 2 and 3, O.T. 1961), in which an opinion of this Court has been rendered, 363 U.S. 555, served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. This is the "printed record" referred to herein. S.R. refers to the supplemental record printed in that case.

## JURISDICTION

1. The suit of the appellants is to enjoin the enforcement of certain Alaska criminal statutes (17 S.L.A. 1959, 95 S.L.A. 1959) on the grounds that the Alaska penal statutes, as to the appellants, are in conflict with federal statutes and regulations.

2. The Supreme Court of the State of Alaska entered judgment June 2, 1961, affirming the judgments of the court below in dismissing the suit for injunction. Notice of appeal was filed in the Supreme Court of the State of Alaska on July 25, 1961.

3. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. 1257(1) and (2). The Supreme Court also retains continuing jurisdiction in this case under its opinion 363 U.S. 555, pp. 561-562.

4. The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

*Gully* v. *First Nat'l Bk.*, 299 U.S. 109;
*Mallinckrodt Chemical Works* v. *Missouri*, 238 U.S. 41;
*New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63;
*Green Bay, etc. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58.

5. The provisions of the statutes, orders and proclamations involved are set forth in the red-covered Appendix to Brief of Kake and Angoon, No. 327, O.T., 1959. (No. 3 O.T. 1961). The citations are as follows:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art. III

Federal Statutes Involved

Revised Statutes, Provisions Common to All the Territories, 1874, § 1839

Alaska Civil Government Act, May 17, 1884, 23 Stat. 24, § 8 proviso
Title 48, United States Code, §§ 101, 112
Judicial Code, Title 28 U.S.C., §§ 1291, 1294
Alaska Statehood Act, July 7, 1958, 72 Stat. 339, §§ 1, 4, 6(e), 7, 8(a), (b), (c), (d), 12, 13, 14, 15, 16, 17, and 18.
Alaska Omnibus Act, June 25, 1959, 73 Stat. 141 §§ 2(a), (b)
White Act, June 6, 1924, as amended, 43 Stat. 464 (48 U.S.C. § 221 *et seq.*)

Constitution of Alaska, Art. IV, §§ 1, 2, and 3; Art. VIII, § 15; Art. XII, §§ 12 and 13; Art. XV, §§ 2, 4, 17, 24, and 25 and Ordinance No. 3.

Rules, Supreme Court of Alaska
Rule 7
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Session Laws of Alaska, 1959
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Chap. 50
Chap. 95
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Proclamations of the President

Jan. 3, 1959, 24 F.R. 81, Admission Alaska

Interior Department
Release Apr. 7, 1960
[Proposed] Indian Fishing Regs., Alaska, 25 F.R. 3079, Apr. 9, 1960
Statement, All Fish Traps, Indian and non-Indian

## QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Do Alaska statutes, to the extent they regulate or prohibit fishing by Indians with the use of traps, conflict with the express reservation to the United States of exclusive jurisdiction over property (including fishing rights) of Indians pursuant to Section 4 of the Statehood Act of Alaska, 72 Stat. 339, as amended by Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141?

2. Is Section 4 of the Alaska Statehood Act inoperative for failure to comply with the conditions annexed to the offer of the people of Alaska in their constitution as to the terms and circumstances under which they abjure jurisdiction over Indian fishing?

3. Is the Alaska Statehood Act, Section 4, as amended, unconstitutional under the Federal Constitution for conflict with the equal-footing doctrine?

## STATEMENT OF THE CASE

The State of Alaska and the United States (through regulations issued by the Secretary of the Interior) each assert jurisdiction, to the exclusion of the other, to regulate trap fishing by appellants.

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984, 988, as amended, 49 Stat. 1250, § 17; 25 U.S.C. § 477); and each has as its membership an entire village of Thlinget Indians. S.R. 82-83, 102. The Village of Kake is located on the northwest side of Kupreanof Island, approximately 100 miles southwest of Juneau, Alaska, and that of Angoon is located on

the southwest side of Admiralty Island approximately 60 miles southwest of Juneau. Each of these appellants operates a fish cannery under the supervision of the Secretary of the Interior and with funds borrowed from the United States Government. S.R. 83, 103. The canneries were purchased with the active assistance of the United States Government through the Bureau of Indian Affairs of the Department of the Interior, and upon the advice of that Agency. Operation of traps is essential to the operation of the canneries at this time. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the resulting damage extending to the very fiber of their social, economic and cultural well-being. S.R. 88-89, 108.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to the land and property which Congress reserved to the control of the United States, namely, "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . ." The third ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6(e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska with the exception of native-owned traps. On February 25, 1959, and April 17, 1959, the Legislature of Alaska enacted 17 S.L.A. 1959 and 95 S.L.A. 1959 making it a crime to erect, moor or maintain fish

traps on or over lands or tidelands owned by the State of Alaska. On March 7, 1959, the Secretary of the Interior issued regulations (24 F.R. 2053) prohibiting fish traps generally, but exempting from the prohibition native fish traps. Some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.[2]

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan), both personally and by his agents, threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of the Kake Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

## HOW THE FEDERAL QUESTION IS PRESENTED

The complaints charged, among other things, that Section 4 of the Statehood Act and Article XII, Section 12, of the Constitution of Alaska, prevented the state from interfering with the control and management of Indian fishing rights held by the Indians or

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[2] See letter to Alaska Area Director set out at length at S.R. 131-132. On the 2nd day of June, 1960, 25 F.R. 4864-6, the Secretary again issued regulations. The 1960 regulations are in their nature permanent, subject to modification from time to time by the Secretary of the Interior. On July 26, 1961, 26 F.R. 7064, delegation for the enforcement of these regulations was made to the Regional Director of Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes were repugnant to the statutes and the commerce clause of the Constitution of the United States. S.R. 87-88, 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92, 110-111.

The Judge of the District Court in his opinion dismissing the complaint stated at the outset that the facts gave rise to a situation "where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority. . . ." R. 60. He resolved that conflict in favor of the state under the "equal-footing" doctrine, holding that the new state was deprived by the federal regulations of authority over its underlying navigable waters and of its "absolute right" to control the killing of game. He held that "the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs. . . ." R. 66.

On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a Circuit Justice, granted appellants' application for an injunction pending final disposition of their future appeals to the United States Supreme Court (80 S. Ct. 33). On June 20, 1960, this Court handed down a decision affirming its own jurisdiction under 28 U.S.C. § 1257(2) "since the court below

sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U.S. at p. 557. But inasmuch as the Alaska Supreme Court had not had the opportunity to pass upon certain antecedent questions of local law involved, the Court refrained at that stage from deciding the issues presented on the merits so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. This Court noted "the original act prohibiting traps was amended by 95 S.L.A. 1959, § 1, so as to provide that it shall not be construed inconsistently with the compact, and if the Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear." 363 U.S. at pp. 561-562.

The Supreme Court of the State of Alaska in its opinion interpreted 95 S.L.A., 1959, as not excepting Indian fishtraps from the operation of the act, App. pp. 46a-47a. The Alaska Supreme Court (App. pp. 34a *et seq.*) attempted to supply information suggested by this Court on the status of the Indian communities in relation to the authority of the Secretary of the Interior without reopening the record or according the parties any opportunity for hearing; and it supplied this information from sources wholly outside the record, contrary to the record, and to known fact and recognized authorities.[3] The Supreme Court of Alaska

[3] *E.g.*, the court stated "there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law." App. p. 34a. See, however, *Tlingit & Haida Indians of Alaska* v. *United States*, .... C. Cls. ....., 177 F. Supp. 452, describing in detail the Tlingit tribe and the lands aboriginally

also, at the request of this Court, addressed itself to the justification of this legislation under the police power concluding that the power withheld from the state under the proviso to regulate native fishing is a type which the federal government cannot withhold from the state under the equal-footing doctrine.

In addition to holding that Congress could not constitutionally limit the authority of the state to regulate native fishing, the opinion held Sec. 4 of the Statehood Act inoperative on the ground that it was not an "acceptance" of the "offer" made to the United States by Alaska in its constitution (Art. XII, § 12), and further construed Secs. 6(e) and 8(d) of the Alaska Statehood Act as indicating the intent of Congress to transfer control of all fishing, including native fishing, to the State of Alaska.

## THE QUESTIONS ARE SUBSTANTIAL

The United States and the State of Alaska are in flat dispute over the regulation of Indian trap fishing.

The major argument of the Supreme Court of Alaska against the validity of the Secretary of the Interior's regulation of native fishing rights is that "the offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition. . . ." (App. p. 18a). "We are forced to conclude that no

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owned by its constituent clans one of which was the Kake Clan and one the Hutsnuwu, or Angoon Clan. The Court of Claims in its finding 25 noted that the Tlingit & Haida Indians presently live in a number of native villages which are almost entirely Indian; and that the Hutsnuwu Tribe, Angoon, and the Kake Tribe are each located at the same place as their original villages.

compact as to fishing rights was formed between the State of Alaska and the United States. . . ." (App. p. 25a). So long as this argument stands, the validity of the entire Statehood Act insofar as it does not follow verbatim the Constitution of Alaska is in question.

There is a distinct conflict between the state and federal governments in the administration of Indian affairs in the State of Alaska. Both the Secretary of the Interior and the State Conservation Division are asserting jurisdiction over native fish traps. The state, while accepting federal Indian Service schools, health services, transportation facilities (App. 40a), and the liberal use of federal money for its native population, denies any relationship between the natives and the federal government. The effect of this decision, therefore, is much broader than the rights of appellants herein to maintain fish traps. It goes to the whole problem as between the state and the federal government as to which shall administer Indian affairs.

Section 4 of the Statehood Act is not violative of the equal-footing doctrine. As did the transitional court, the Supreme Court of Alaska based its arguments that the equal-footing doctrine is involved on *Ward* v. *Racehorse*, 163 U.S. 504. It dismissed contentions that *Ward* v. *Racehorse* is out of line with the Supreme Court's many decisions sustaining federal retention of jurisdiction over Indian fishing and hunting,[4] and hoisted itself by its own bootstraps by equat-

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[4] *Gaines* v. *Nicholson*, 9 How. 356, 365; *United States* v. *Winans*, 198 U.S. 371, 380-381; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5; *Dick* v. *United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-46, 49.

ing the instant case with *Racehorse* on the ground that Section 4 of the Statehood Act being of no effect (as construed by the court), "The act of admission contained no exception in favor or for the benefit of the Indians." App. 30a.

## CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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